**INDUSTRIAL & COMMERCIAL INSURANCE (M) SDN BHD**

**v.**

**LEMBAGA PENYATUAN DAN PEMULIHAN TANAH PERSEKUTUAN**

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL KADIR SULAIMAN J
[CIVIL APPEAL NO: R1-12-131-91 & R1-12-215-92]
6 SEPTEMBER 1996

***CIVIL PROCEDURE:*** *Pleadings - Amendment of defence - Original defence bare denial - Application by plaintiff to strike out defence - Application by defendant to amend defence - Plaintiff's application made before defendant's application - Duty of judge at hearing of plaintiff's application - Whether adjournment should be allowed pending defendant's application - Subordinate Courts Rules 1980, O. 14 r. 21, O. 15 r. 1(1)*

***CIVIL PROCEDURE:*** *Pleadings - Striking out defence - Notice of application to strike out defence served less than two clear days before hearing - Whether judge should adjourn matter - Subordinate Courts Rules 1980, O. 24 r. 3*

***CIVIL PROCEDURE:*** *Appeal - Appeal from Sessions Court judge - Defence struck out - Appeal filed - Application made to reinstate defence although appeal not yet heard - Whether should be allowed - Subordinate Courts Rules 1980, O. 14*

By their statement of claim dated 3 November 1990, the respondents ('the plaintiffs') had claimed against the appellants ('the defendants') on a guarantee for RM24,306, interest and costs. The defence was a mere denial which put the plaintiffs to strict proof of the allegation. The plaintiffs applied to strike out the defence under O. 14 r. 21 of the Subordinate Courts Rules 1980 ('the SCR') but before the hearing of the application, the defendants applied to amend their defence. At the hearing of the plaintiffs' striking out application, counsel for the defendants' applied for an adjournment pending the hearing of the defendants' application for amendment, and the fact that they had not been given two clear days notice of the plaintiffs' striking out application as required under O. 24 r. 3 of the SCR. The Sessions Court judge disallowed the defendants' request for an adjournment, struck out their defence, and entered judgment in the plaintiffs' favour. The defendants appealed *vide* Appeal No R1-12-131-91, but consequent to the judgment, paid the plaintiffs the judgment sum on 1 July 1992.

Notwithstanding their pending appeal, the defendants subsequently filed an application to set aside the Sessions Court judge's order, for a stay of execution of judgment and leave to file their amended defence within 14 days. This application was dismissed and the defendants appealed, *vide* Appeal No R1-12-215-92.

**Held:**

**[1]** Order 15 r. 1(1) of the SCR gives the court discretion to allow parties at any stage of the proceedings to amend their pleadings on such terms as it may direct, as such amendments are not a matter of favour or grace. The duty of the court is to decide matters in controversy. In the present case there was a pending application by the defendants to amend their original defence and the Court's attention was expressly drawn to that but the judge had overlooked the provisions of O. 15 r. 1(1) of the SCR. It would have been prudent on the part of the judge to either hear the defendant's application before disposing of it or to adjourn the hearing of the plaintiff's application pending the disposal of the defendants' application to amend. Thus the order made by the judge should be set aside.

**[2]** The plaintiffs' notice of their application to strike out the defence was served on 24 April 1996 for the hearing on 26 April 1996. Under O. 24 r. 3 of the SCR, a notice must be served not less than two clear days before the hearing date. This fact, although brought to the judge's attention, was ignored. On that ground, the appeal should be allowed.

**[3]** In the light of the defendants' pending appeal in Appeal No R1-12-131-91, they ought not to have filed another application to the Sessions Court to have the earlier order set aside. There is no provision in O. 14 of the SCR for them to do so.

**[4]** The Sessions Court judge was directed to hear the defendants' application to amend their defence and the moneys paid to the plaintiffs was ordered to be refunded to the defendants with interest at 8% pa from 1 July 1992 to the date of repayment.

*[Appeal allowed.]*

**Case referred to:**
*Cropper v. Smith [1883] 26 Ch D 700* ***(foll)***

**Legislation referred to:**
Subordinate Courts Rules 1980, O. 14 r. 21, O. 15 r. 1(1), O. 24 r. 3

*For the appellants - Rueben Mathiavaranam; M/s Azman, Davidson & Co*
*For the respondents - Ramid Khan; M/s Zainur Zakaria & Co*

*Reported by Anne Khoo*

## JUDGMENT

**Abdul Kadir Sulaiman J:**

These two appeals were heard together as they involve the same parties and arose out of the same suit. The appellants are the defendants and the respondents are the plaintiffs in the suit before the learned Sessions judge. Civil Appeal No. R1-12-131-91 is an appeal against the order striking out of the defence of the appellants and the entry of judgment for the respondents. Civil Appeal No. R1-12-215-92 is in respect of the order of dismissal of the appellants' application to have the order in the first appeal set aside. Consequent upon the order of the court below in respect of the first appeal, the appellants paid the judgment sum to the respondents. On 15 April 1996, I allowed the appeals by the appellants and ordered that the judgement sum paid be refunded to the appellants with interests at 8% p.a. from 1 July 1992 till the date of full payment and the sum lodged by way of security for the costs of the appeal be refunded to the appellants. The respondents now appeal against my said decision of 15 April 1996 and I now provide my grounds for the decision.

By their statement of claim of 3 November 1990 the respondents claim against the appellants upon a guarantee for a sum of RM24,306 and interest from 31 May 1989 at 8% p.a. and costs. The defence of the appellants is a bare denial and merely put the respondents to strict proof of the allegation. On 30 March 1991 the respondents applied for the striking out of the defence of the appellants and the entry of judgment in their favour pursuant to O.14 r. 21 of the Subordinate Courts Rules 1980 (hereinafter referred to as 'the SCR'). The hearing of this application by the respondents was fixed for 26 April 1991. In the meanwhile, on 15 April 1991 the appellants applied for leave to amend their defence but no date was then fixed for the hearing of the appellants' application.

On the hearing of the respondents application on 26 April 1991 the learned Sessions judge allowed the application by the respondents. The grounds of decision of the learned judge are found at p. 12 of the record of appeal and the notes of evidence is at p. 14 thereof.

According to the notes of evidence, at the commencement of the proceedings on 26 April 1991 the learned counsel for the appellants drew the attention of the court of their pending application for amendment of the defence filed on

22 April 1991. He requested for an adjournment of the hearing of the respondents' application under O. 14 r. 21 of the SCR pending the hearing of the appellants' application for amendment and the attention was also drawn that the respondents' application was served only on 24 April 1991 which was short of the required two clear days notice. The court below disallowed this request for adjournment and neither proceeded to hear the application for amendment of the defence but instead proceeded to dispose off the said application of the respondents and allowed the application. The appellants being dissatisfied with the said decision of the learned judge, now appeal to this court in Civil Appeal No. R1-12-131-91.

From the record of appeal in Civil Appeal No. R1-12-215-92 it is disclosed that on 9 May 1991 the appellants filed an application to have the order of 26 April 1991 against them be set aside. Also in the same application are prayers for the stay of execution of the order and for leave to file their amended defence within 14 days. This application is made notwithstanding the appeal filed in Civil Appeal No. RI-12-131-91. By an order dated 30 May 1992, this application of the appellants was dismissed. The appellants being dissatisfied with the decision filed another appeal which is the subject matter in Civil Appeal No. R1-12-215-92.

At the hearing of these two appeals, the learned counsel for the appellants conceded that the original defence as filed was a bare one. The reason given was that it was done pending the availability of relevant documents from his client, the appellants. He intended to follow it up with an application for the amendment of the said defence upon the availability of the relevant document which application could be made at any stage of the proceedings. This he did by filing the application for the same on 22 April 1991 which was before the hearing of the respondents' application for striking out. In the circumstances, he contended that the learned Sessions Judge was wrong in allowing the application of the respondents based on the appellants' original defence without first disposing off the appellants' said application for amendment. Order 15 r. 1(1) of the SCR gives the court the discretion to allow parties at any stage of the proceedings to amend their pleadings on such terms as to costs or otherwise as may be just and in such manner as it may direct. Here is a case where there was pending before the court an application made by the appellants to amend their original defence and the attention of the court was expressly drawn to that. But this was disregarded by the learned judge. The reason given by the learned judge was the delay in the appellants in filing their proposed amendment. But I believe the learned judge had overlooked the provisions of O. 15 r. 1(1) of the SCR allowing the appellants to do so at any stage of the proceedings. The making of an application for an amendment of the pleadings is not a matter of favour or grace. The duty of the court is to decide matters

in controversy. Bowen LJ in *Cropper v. Smith* [1883] 26 Ch. D 700 at p. 710 said:

> It is a well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they made in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendments a matter of favour or grace ... It seems to me that as soon as it appear that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right.

In the circumstances of this case it would have been prudent on the part of the learned judge upon coming to his knowledge of the pending application of the appellants for amendment to either hear the said application before proceeding to dispose off the application of the respondents for the striking out of the appellants' original defence or to adjourn the hearing of the respondents' application as so requested by the appellants until the disposal of the appellants' application. I would therefore, agree with the submissions made by the learned counsel for the appellants and the learned Judge's decision which arose in Civil Appeal No. R1-12-131-91 must be set aside.

In his submission, the learned counsel for the appellants also raised the issue of short service upon the appellants of the application of the respondents for striking out of the defence and the entry of judgment. The said notice was served only on 24 April 1996 for the hearing on 26 April 1996. Under O. 24 r. 3 of the SCR, generally a notice must be served on every other party not less than two clear days before the day specified for hearing of the application. This fact was brought to the attention of the learned judge as the appellants in this case were only given one clear day to answer the said application of the respondents. However, this too was ignored by the learned judge. On this ground too, I agreed with the submissions so made and in the circumstances of the case, the more so that the learned judge should have allowed the application for adjournment of the respondents' said application. On this ground too, I allowed the appeal by the appellants.

As regards the appeal in Civil Appeal No. R1-12-215-92, in the court below in the proceedings to set aside the order of 26 April 1991, the learned counsel for the appellants submitted that the said order should be set aside as of right because of the short service on them of the notice to hear the respondents'

application. On the other hand, the learned counsel for the respondents submitted that on the hearing of the respondents' application both parties were given the right of hearing. The decision of the court in that proceedings was *functus officio*. The only right of the appellants is to appeal against that decision and not by way of having the learned judge to vary his own decision. As regard the appeal to the High Court against the said decision, the appellants had done so in this case. After hearing the submissions from both sides the learned judge dismissed the said application of the appellants to set aside the order of 26 April 1991. Hence this second appeal to the High Court. In the record of appeal filed by the appellants there does not appear to be the grounds of decision of the learned judge on this issue. However, there is found at p. 22 thereof the grounds of decision by the learned judge in relation to an application by the respondents as found at p. 51 thereof dated 1 November 1991 for the following orders:

(a) that the order obtained by the appellants on 28 October 1991 be set aside;

(b) that the judgment obtained by the respondents on 26 April 1991 be reinstated; and

(c) that the application of the appellants of 9 May 1991 be struck off.

Thus it would appear that on 28 October 1991 the appellants were successful in having the order of 26 April 1991 set aside which prompted the respondents to file the above application. However, a copy of the order of 28 October 1991 was not exhibited in the record of appeal. In the grounds of decision at p. 22 the learned judge allowed the application of the respondents on terms prayed and had left the matter concerning his decision of 26 April 1991 to the High Court on appeal in Civil Appeal No. R1-12-131-91. In the record of appeal at p. 9 there is a draft order of 30 May 1992 dismissing the appellants' application of 9 May 1991 for the setting aside of the order of 26 April 1991 giving judgment for the respondents. Be that as it may, in the light of my decision in Civil Appeal No. R1-12-131-91 above, the decision in this Civil Appeal No. R1-12-215-92, confusing as it were, becomes less significance. All I can say is that in the light of the pending appeal in Civil Appeal No. R1-12-131-91 the appellants ought not at the same time to have filed another application in the court below to have the order of 26 April 1991 set aside. There is no provisions in O. 14 of the SCR for them to do so.

For the above reasons I allowed the appeal by the appellants. The order of 26 April 1991 was set aside with a direction for the learned Sessions Judge to hear the application of the appellants of 15 April 1991 to amend their

original defence. The respondents was given the liberty to file any application under O. 14 r. 21 of the SCR after that. As the appellants, consequent upon the order of the learned judge of 26 April 1991, had paid the respondents the judgment sum an 11 July 1992, 1 also made the order that the amount be refunded to the appellants with interest at 8% pa from that date to the date of full repayment. I also ordered the deposits paid on account of these two appeals be refunded to the appellants.